

# The Constitution as an Instrument of Public Welfare

By WALTON H. HAMILTON

THE very phrase "The Constitution as an Instrument of Public Welfare" would seem an anomaly. It implies that a clash in values can arise between the Constitution of the United States and that thing called "public welfare." Now it was an axiom of the undergraduate political science courses to which I was exposed, that the Constitution is an instrument of government and the object of government is to serve the "public welfare." So the fact that there can be a clash between the document itself and the thing it serves is *per se* a challenge. That the question is raised at all seems to me to indicate that we are face to face with one of our most significant problems. It is one of the many great problems that have arisen in what that philosopher Mr. Thomas Jefferson would call "the course of human events." And due to the fact that the world in which we live and the ideas within our heads belong to the twentieth century, there may be a bit of the taint of our own times in some of the contemporary discussion of the Constitution.

As a way of approach to the subject I wish to touch upon each of three things: First, the Constitution as a document; second, the Constitution as an institution; and thirdly, Constitutionality as a way of thought.

The Constitution as a document was drawn up in 1787, which is a great many more decades away than some chronologists would have it, and paradoxically much nearer to some of us, in terms of opinion, than most of the construers of the Constitution are willing to admit. It is hard now to recapture the "climate of opinion" which prevailed at that time, and almost impossible to discover the secrets of the discussions that took place while the convention was meeting during that hot summer of 1787. As we all know, James Madison greatly changed his views in the course of his life, and his Journal of the Convention, the most complete written record of what took place, represents to a very large extent what Madison *came* to believe rather than what the youthful Madison, who sat in that Convention, felt.

Then too it is almost impossible for us to read ancient documents and get from them the meaning of those who drew them. Words pass somewhat uncertainly between us currently. And words pass even more uncertainly between decades. For example, I have taken a sample, ancient and modern, of meaning of the words in the phrase "Commerce among the several States," which, of course, just now is of significance. I went through all of the English dictionaries in the Library of Congress that were published from 1725 to 1787, and looked at the meanings of four words, "trade," "industry," "business," and "commerce." "Trade" during that century had ceased to be a "craft" and was being applied to any economic occupation. The word "industry" was used mainly in the sense of being industrious and applied to any kind of beneficial labor. It was quite devoid of meaning in the sense in which we refer to national industrial problems. More than half of the dictionaries omitted the word "business" entirely, and when it was given, used it wholly in the sense of a peculiar, or personal, interest and occupation. "I must be about my Master's business" explains the usage—there is no hint of any other meaning for this word at that time.

The only word of these four which was used that has any relationship whatever to our present world of interlocked production and distribution is the word "commerce." And "commerce" was used in the sense of having any conversation, correspondence, or intercourse with another person. Also it was used in the more general sense of dealing in, or with, any goods or commodities. In the eighteenth century "commerce" was the word corresponding to our modern word "business" or "industry." I could not find in a single dictionary any indication that the word meant movement of goods—there was no hint of "stream" or "flow of commerce" in 1787. And yet that is the criterion, now used more frequently than any other, by which the United States Supreme Court interprets the phrase "commerce among the several states." This I submit as a mere sample of the great contrast between ways of thought existing in 1787 and 1936. A comprehensive and diligent inquiry is absolutely necessary to recapture the "climate of opinion" and catch the implications which were written into the words of the late eighteenth century.

It is not surprising that even in law schools today the instinctive

reaction of an individual, when faced with a question of "Constitutionality," is to go to the reported cases. The suggestion that a student should go to the Constitution itself, would be taken as a novel idea. The text is there but to a very large extent the meaning that underlies the text is completely lost. The Constitution as we know it simply uses the document of 1787 as a spring board. What was set down as interpretation becomes the basis for later decisions. We have all come across the weighty tomes that interpret the lines of Shakespeare's plays, and have been amused at the footnotes on footnotes that explained other footnotes. The Bible too has been generously interpolated. Each age reads into the same lines new and varied meanings and revises the meanings discovered by the preceding age to suit itself. Gloss is laid upon gloss; interpretation piled upon interpretation. So it appears to me the Constitution of 1936 simply uses the document of 1787 as one of its raw materials. Our Constitution is really a collection of slowly changing institutional and intellectual usages. The words are carried over, the meaning that lives in these words is subject to constant change.

Probably one of the most dramatic instances of this change is seen in the history of the expression "due process of law." Originally written into the Bill of Rights, and again written into the Fourteenth Amendment in 1868, the phrase had simply to do with procedure and nothing else. That was the assumption on the part of those who, after the Civil War, tried to protect and insure the rights of the Negro against his ex-masters. Later Roscoe Conkling denied this and insisted that there was another purpose, but this looks suspiciously like rationalization on his part. In the first case of importance involving the clause it was invoked to protect the southern whites against carpet-bag legislatures. To Mr. Justice Campbell, a Jeffersonian Democrat of the old school, it was a grand opportunity to insert the rights of man—"life, liberty, and pursuit of happiness"—into the Constitution, but later the rights of man were commuted into the privileges of corporations against social legislation, despite the fact that the corporation was a creature of the State and possessed, in its early history, no rights save those with which the State endowed it.

The change came gradually, of course, and it was not until 1887 that we find the first clear-cut declaration of the immunity of corporations from regulations under the "due process clause." It was

imported as a doctrine into the instrument just before the close of the century and has enjoyed little more than four decades of history, but from 1888 to 1918 it was invoked in 790 cases before the Supreme Court. And here again we see an indication of the process through which usages grow up into what is called a "living constitution." That the "due process" clause could be embedded practically unnoticed in the Constitution itself for seventy years and then become a controlling factor in constitutional law shows quite clearly that though we have, in contrast to England, a written constitution, that document of 1787 is in the main merely the raw material for the social and intellectual formulas of 1936.

Finally, in considering the Constitution as an institution, we may notice a development of the last two years. The country has been subject to a more violent attack of constitutionalism than has been seen since the Civil War. It is not the Constitution. It is the use of the Constitution as a fetish.

Three years ago the people most concerned in industry were shouting wildly that national legislation in regard to the country's industry was imperative. Today trade and industry must be left to the states for regulation. States' rights, moribund for all practical purposes since Lee's surrender at Appomattox, have again become the palladium of our liberty and happiness. The words are mouthed with a theological intonation.

"States' Rights must be preserved!" The Constitution must not be tampered with! It has assumed a semi-divine character as though it had been handed down from Sinai—a character which would have astonished the young men who wrote it. For the "Founding Fathers," whose average age was only 44 years at the time of the Convention—and among whom were men in their twenties—had little reverence for divinity in government. They had all shared in puncturing the fallacy of a divine right in kings. That their work in Philadelphia should be clothed with the same sanction would have amused them no end.

In conclusion, I feel that in regard to the immediate future, and to the various issues which will presently be before the court, that Constitutionality as a way of thinking offers an answer. The Supreme Court will serve as well as any other instrument in solving the problems of national regulation of national industry, social secur-

ity legislation and other kindred issues. What is constitutional and what is not, however, will depend more upon the gloss than upon the text. The question, moreover, is not what either the Constitution or the former decisions force the Court to do. The question is very largely what the Court is going to decide to do in the matter. Mr. Justice Holmes, just before his resignation, was hearing a case in which a lawyer closed his pleading with: "May it please your Honors, you must decide in favor of my client, or go back on every one of your former decisions." Mr. Justice Holmes gently replied, "But Mr. H—, if I were you I would not worry. It seems to me that the ingenuity, even of this Court, can rise to that occasion."

After the United States Supreme Court had outlawed a statute of the State of New Jersey because fees of employment agencies were regulated, within three years the same Court decided to sustain an Act that regulated the fees of insurance companies to their agents. Ingeniously, the Court commented on the second case, saying, "This Court presumes that a state act is constitutional. That presumption can be overcome by a record of fact showing that the evil did not exist or the remedy is not an appropriate one." The Court's ingenuity, also, easily overcame the objections by Arizona to Federal authority in the construction of Boulder Dam. The Court found Federal authority under Congress' power over navigable waters. Now the Colorado River is not navigable in the ordinary sense. But there was a period in the past when the river was navigable (for canoes) and through some technological change, said the Court, which may occur in the future, it may again become navigable.

It's very like the story in which the little boy objected to Uncle Remus that rabbits could not climb trees. Uncle Remus replied that on this occasion the rabbit was "bliged" to climb a tree, for otherwise he could not have escaped Brer Fox. Certainly the ingenuity of the Court can rise to the occasion. The question is not whether the Court can if it will, but rather whether the nine Justices will when they can. A plausible constitutional argument can be written on both side by any second year law student. Any argument, of course, must rest on its presumption and presumptions for the most part will be founded upon things that really cannot be disputed about. So the question as a question resolves itself into one of the Judicial Will.

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